23-3
123-3-37 See No. 214 + 215 for briefs in these cases

AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 669.

GEORGE W. WELLES, EXEC'R, &c., WOOLSEY WELLES, A. K. WELLES AND W. B. WELLES, JUNIOR, PLAINTIFF IN ERROR,

vs.

GEORGE CRANE, ADMINISTRATOR OF EDWARD K. GOODNOW, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

RECORD FILED SEPTEMBER 29, 1886.—AGREED RECORD FILED OCTOBER 5, 1887.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, OCTOBER 6, 1887.

1 *Appeal from the Webster Circuit Court.*

Supreme Court of Iowa. June Term, 1884. In Equity.

EDWARD K. GOODNOW

vs.

GEORGE W. WELLES and Others.

Theo. Hawley, for appellants; Geo. Crane, for appellees.

Appellant's Abstract of Record.

On the 30th day of June, 1881, the plaintiff filed in the circuit court of Webster county a pleading as follows:

And now comes the plaintiff in the above-entitled suit and, by leave of court first had and obtained, files the following pleading—that is to say, the plaintiff claims of the defendant the sum of six thousand dollars ($6,000) and interest thereon, and for cause thereof says:

Par. I. That on or about the 15th day of May, 1856, the Congress of the United States, by an act approved on that date, granted and conveyed to the State of Iowa, in trust to aid in the construction
2 of a railroad from the city of Dubuque, on the Mississippi river, across said State to a point on the Missouri river, near Sioux City, every alternate section of land designated by odd numbers for six sections in width on each side of said railroad; and in case there was not enough within said six-mile limits subject to said grant to make the full six sections of land for each mile of railrond to be constructed, then the said grant and conveyance made by Congress was to cover and apply to so much land within fifteen miles on either side of said railroad, in alternate sections or parts of sections as should be equal to the amount of lands in odd-numbered sections within the said six-mile limits as were not subject to the operation of said grant; that to make a full grant of six sections per mile said State became entitled to and received a proper certificate for all the odd-numbered sections and parts of sections within the said six and fifteen-mile limits that had not been sold or otherwise appropriated by the United States and to which the rights of pre-emption had not attached, including the land described in the plaintiff's petition.

Par. II. Plaintiff further says that on or about the 14th day of July, A. D. 1856, the said State of Iowa having duly accepted said grant and undertaken the trust therein declared by act of the legislature approved on that date, granted all of said lands claimed to be embraced in said grant to the Dubuque & Pacific Railroad Company, a corporation duly organized under the laws of Iowa, on condition that said company would build the railroad contemplated in said act of Congress.

That afterwards, in August, A. D. 1860, the said Dubuque & Pacific Railroad Company sold, transferred, and conveyed its said railroad and all its property of every kind and nature, including all its right,

title, and interest in and to the lands given or granted to it by said State of Iowa to aid in the construction of said railroad to the Dubuque & Sioux City Railroad Company, a corporation duly
3 organized under the laws of Iowa, which said conveyance was afterwards recognized, approved, and assented to by the State of Iowa.

Par. III. Plaintiff further says that said railroad companies duly constructed said railroad according to the terms and requirements of said act of Congress, and prior to the year 1861 had constructed enough of said railroad to entitle them to all the lands designated or covered by the language of the granting clause of said act of Congress, and lying or being on the west side of the Des Moines river, in Webster county, Iowa, including the lands described in the petition.

Par. IV. Plaintiff further says that from the year 1860 to 1873 the Dubuque & Sioux City Railroad Company, under and by virtue of said grant of land and the construction of said railroad, honestly and in good faith believed that it was the absolute owner of and held a good and valid title during the years 1860, 1861 and 1862, till the 12th of day of November, A. D. 1863, to the following-described lands, to wit:

The north ½ the northwest ¼ and east ½ of the northwest ¼ of section 11, township 87, range 27; the north ½ of section 9, township 87, range 28; the southwest ¼ of northwest ¼; the west ½ of the southwest ¼ of section 3, township 88, range 27; the east ½ of northwest ¼ of section 1, northeast ¼ of section 3, and southwest ¼ of section 11; the west ½ and northwest ¼ of section 13; the south ½ of northwest ¼ and southwest ¼ of the southwest ¼; the west ½ of northeast ¼; the northwest ¼ of the south ½ of section 19; the east ½ of northwest ¼ and northeast ¼ of section 21; the southwest of northeast ¼; the north ½ of the southeast ¼ of section 23; the west ½ of southwest ¼ of section 25; all of sections 29 and 31; the northwest ¼ of section 33 and all of section 35, except the east ½ of northeast ¼; all in township 88, range 28; all of sections 11, 13, 17, and 25, and the north ½ of section 23, all in township 88, range 29; all of section 33, township 89, range 28, all in Webster county and State of Iowa.

All of which lands are designated by odd numbers, and are
4 within the six and fifteen mile limits of said railroad, and without which said railroad grant did not amount to six sections per mile of railroad built.

But in the year 1873, the Supreme Court of the United States in a suit therein pending, for the purpose of testing the right and title of the Iowa Homestead Company, a grantee of the said Dubuque & Sioux City Railroad Company to the land aforesaid, decided finally that neither said railroad company nor said homestead company was the owner thereof and never had any title or right thereto, since which time neither of said companies has claimed to be the owners of said lands or any part thereof.

Par. V. That during the continuance of said belief and claim of ownership the said Dubuque & Sioux City Railroad Company paid to Webster county, a municipal corporation under the laws of Iowa,

and within whose territorial limits said lands are situated, the taxes which were duly assessed and levied upon said lands by said county, that is to say, the amounts and at the dates following and for the following years respectively:

For the year 1861, paid Oct. 31st, 1866, $2,610.15.
For the year 1862, paid Dec. 7th, 1863, $1,395.
For the year 1863, paid Jan. 20th, 1864, $1,308.45.

Par. VI. Plaintiff further say that the taxes so assessed and levied upon said lands became and were a valid and binding lien thereon in favor of said county, which said lien was superior or paramount to all other liens or incumbrances thereon.

Par. VII. Plaintiff further says that long prior to the assessment and levy of said taxes upon said lands the said Wm. B. Welles, deceased, became and was owner in fee simple of all lands described in plaintiff's petition, and continued to be such owner until the year 1878, when he conveyed the same in trust to said Woolsey Welles, A. K. Welles, and Wm. B. Welles for certain donors as mentioned in the conveyance thereof, and the said trustees as such are owners and holders of all the estate and interest therein which was
5 owned by the said Wm. B. Wells in his lifetime, subject to the lien of plaintiff for said taxes; that the said Wm. B. Welles died in the year 1878 in the State of New York on the — day of ——, and that during all his lifetime he was a non-resident of the State of Iowa and a citizen of the State of New York. But of said Wm. B. Welles said ownership of said property or lands the Dubuque & Sioux City Railroad Company had no knowledge or notice at the time of constructing said railroad nor till long after the payment of the taxes aforesaid.

Par. VIII. Plaintiff further says that neither said Wm. B. Welles nor his executor has ever paid to said Webster county any part of the taxes aforesaid, and said county has always hitherto refused to refund any part of the taxes paid to it.

Par. IX. Plaintiff further says that Wm. B. Welles was always a non-resident, and his executor, Geo. W. Welles, has always been a non-resident of the State of Iowa.

Par. X. Plaintiff further says that the Dubuque and Sioux City Railroad Company has assigned, transferred, and set over to the said plaintiff all its right, title, and claim for all of said taxes and the right to collect the same from said defendant, a copy of which assignment is hereto attached, marked Exhibit "B," and made a part of this petition.

Par. XI. Plaintiff further says that on the death of the said Wm. B. Welles, the said Geo. W. Welles was duly and legally appointed administrator of his estate and immediately entered upon the discharge of his duties as such administrator.

Wherefore plaintiff asks judgment against the said George W. Welles, as administrator of the estate of the said Wm. B. Welles, deceased, for the sum of six thousand dollars, interest and costs of suit, and that it be made a special lien on the lands above
6 described, and that plaintiff have such other and further re-

lief in the premises as equity and good conscience may require and to the court may seem meet.

GEORGE CRANE,
Attorneys for Plaintiff.

Afterwards, and on the 21st day of April, plaintiff filed the following amendment:

And now comes the plaintiff for amendment and addition to his petition heretofore filed says that the said Wm. B. Welles departed this life in August, A. D. 1878; that on the 22nd day of October, 1878, the said George W. Welles was duly appointed and qualified as executor of the estate of said Wm. B. Welles, deceased; that said George W. Welles is now and always has been a non-resident of the State of Iowa; that as such executor said George W. Welles is bound to pay plaintiff the said sum of six thousand dollars, interest and costs of suit; wherefore plaintiff asks judgment against him as such executor for said sum of money, interest and cost; that the same be made a lien upon said lands and for general relief in the premises.

GEORGE CRANE,
Attorney for Plaintiff.

And afterwards, and on the 9th day of November, 1881, the plaintiff filed another amendment, as follows:

And now comes the plaintiff Goodnow, and for amendment and addition to his petition heretofore filed, says that the said George W. Welles has been duly appointed by the circuit court of Webster county, Iowa, administrator of the estate of Wm. B. Welles, deceased, and has entered upon the discharge of his duties as such administrator. Plaintiff further says that Woolsey Welles, A. K. Welles, and Wm. B. Welles, Jr., pretend and claim they have some interest in or lien upon the real estate described and mentioned in the petitions heretofore filed in this case by the plaintiff. Plaintiff further says that if the said above-mentioned persons or either of them has any interest or estate in or right to said land or any part
7 thereof it is entirely subordinate and inferior to the lien or claim of plaintiff and was created long after the lien of plaintiff accrued upon said land.

Wherefore plaintiff asks that the said Woolsey Welles, A. K. Welles, and Wm. B. Welles, Jr., be made defendants to this suit; that they and each of them be required to show what interest, if any, he has in said land; that such estate or interest be adjudged to be inferior to that of plaintiff; that plaintiff have a judgment against the said George W. Welles, as administrator of said Wm. B. Welles, deceased; that plaintiff's said claim for taxes be decreed to be a special lien upon said land; that said land be sold to satisfy said claim and lien; that each and all of said defendants be forever barred and foreclosed of and from all right and equity of redemption in the said land and every part thereof, and enjoined from ever as-

serting or setting up any claim thereto, and that plaintiff have general relief in the premises.

GEORGE CRANE,
Attorney for Plaintiff.

And afterwards and on the 15th day of Dec., 1881, the defendant, George W. Welles, filed his motion as follows:

Comes defendant and shows unto the court that the claim upon which this action is action is founded is for a money demand; that plaintiff asks for a money judgment against defendants, and that this action should be prosecuted by ordinary proceedings. The defendants, therefore, moves the court to transfer this cause to the law docket, and that the same be prosecuted and the issue tried by ordinary proceedings.

THEO. HAWLEY,
Defendants' Attorney.

And the same coming on to be heard the court overruled the said motion; to which ruling the said defendant duly excepted.

8 And afterwards, on the sixth day of February, 1882, the plaintiff filed another amendment as follows:

And now comes the plaintiff, Edward K. Goodnow, and, by leave of court first had and obtained, amends and adds to his petition heretofore filed in this suit, and says that the claim herein sued for was clearly stated, sworn to, and duly filed against the estate of the said Wm. B. Welles declared in the circuit court of Webster county, State of Iowa, a copy of said claim with notice of the hearing thereof was served upon the said administrator ten days before the said hearing, the original of which has been destroyed and no copy there*by* can be attached; said claim was so filed in said court within six months after notice of the appointment of the administrator of said estate; that said claim was presented to the said administrator for payment before it was filed in said circuit court and he refused to pay the same or admit its correctness.

Plaintiff further states that a portion of the lands mentioned in the petition, to which his lien originally attached, have been sold by the defendants to *bona fide* purchasers who received the same without any notice of plaintiff's said lien, by reason whereof plaintiff's said lien as to the lands so sold has been lost or destroyed. But plaintiff avers that the lands not so sold are liable for the payment of his claim against said estate, although all of the lands mentioned in said petition will be wholly insufficient to pay the amount of plaintiff's said claim, by reason whereof plaintiff will be compelled to make a portion of his said claim out of the property belonging to said estate but not affected by said lien.

Plaintiff further says that the said Woolsey, A. K. and Wm. B., received said lands in trust to be by them sold and the proceeds of such sales were and are to be distributed by them among a large number of grantees or donees to the plaintiff wholly unknown and

who are entirely too numerous to be made defendants to this suit. Wherefore plaintiff asks that he have judgment against said George W. Welles, as administrator of the estate of Wm. B. Welles, deceased, for the sum of forty-eight hundred dollars and not six thousand, as heretofore prayed, and that he be required to render a true
9 account of the personal assets in his hands; that said lands be sold to pay said judgment, and that all of said defendants be forever barred and foreclosed of all right and equity of redemption in and to said lands and every part thereof, and that he have such other and further relief in the premises as in equity and good conscience he may be entitled to and to the court may seem meet.

EDWARD K. GOODNOW,
By his Attorney, GEORGE CRANE.

And afterwards and on the — day of ——, 1882, the plaintiff filed another amendment as follows:

And now comes the plaintiff, Edward K. Goodnow, and for amendment to his petition heretofore filed, and, in addition thereto, says that J. P. Dolliver has also been appointed administrator of the goods and chattels and estate of the said Wm. B. Welles, deceased, by this court, and has entered upon the discharge of his duties as such administrator. Plaintiff therefore asks that said Dolliver be made defendant, and that plaintiff have and recover judgment against him as such administrator, for the sum of forty-eight hundred dollars and costs of suit.

GEORGE CRANE,
Attorney for Plaintiff.

And afterwards and on the — day of ——, 1883, the plaintiff filed another amendment, as follows:

And now comes the plaintiff in the above-entitled suit, and amends his petition herein and says that, since the commencement of his suit, he has transferred to George Crane one-fourth interest in the above suit, and hereby makes the said Crane a party plaintiff in this action.

EDWARD K. GOODNOW,
By his Attorney, GEORGE CRANE.

That afterwards and on the 21st day of May, 1883, the plaintiff filed another amendment, as follows:

And now comes George Crane and states to this court that
10 since the commencement of this suit he has become interested jointly with the plaintiff, Goodnow, who has assigned to said Crane one-fourth interest or right in said action, as copy of which assignment is herein set out in the words following:

For value received I hereby assign and transfer to George Crane one-fourth part of the claim or demand sued upon in the case of Edward K. Goodnow against George W. Welles, now pending in the

circuit court of the United States for the southern district of Iowa, and numbered on the docket 1932.

ED. K. GOODNOW.

That by virtue of said assignment said Crane became and is jointly interest with the plaintiff, Goodnow, in the prosecution of said claim, and therefore asks to be made a party plaintiff in said action.

GEORGE CRANE, *Pro. Se.*

And afterwards and on the 5th day of June, 1883, the defendants filed the following

Motion.

Comes now the defendant and shows unto the court that this action was originally commenced against George W. Welles as executor of Wm. B. Welles, deceased, under an appointment as such executor by the circuit court of Webster county, Iowa; that by an amendment subsequently filed the plaintiff has made J. P. Dolliver defendant, alleging that he has been appointed administrator of the estate of said Wm. B. Welles, deceased, by the circuit court of Webster county, Iowa; that there is no allegation in said petition or amendment that the said George W. Welles has been removed and his appointment vacated. The defendant, therefore, moves the court to require the plaintiff to elect against which of said representatives of said estate he will further prosecute this action and that the same may be dismissed as against the other.

THEO. HAWLEY,
Defendant's Attorney.

And afterwards, to wit, on the 6th day of June, 1883, the
11 plaintiff filed another amendment, as follows:

And now comes the plaintiff, Ed. K. Goodnow, and for amendments to his petitions heretofore, and in addition thereto, says that the claim sued upon was presented to the administrator, J. P. Dolliver, before he was made party to this suit, and he refused to pay the same, wherefore plaintiff asks judgment as heretofore prayed.

GEORGE CRANE,
Attorney for Plaintiff.

And afterwards and on the 29th day of August, 1883, the defendants filed their answers.

The defendant, George W. Welles, for answer to the petition and amendments thereto of the plaintiff, says:

I.

He denies each and every allegation contained in first, second, and third paragraphs of said petition.

II.

He denies each and every allegation contained in fourth paragraph thereof, except as herein expressly alleged. He avers that the title to said lands was definitely and finally decided at the December term, 1866, of the Supreme Court of the United States, in the case of Wolcott *vs.* Des Moines Navigation & R. R. Co. and Burr *vs.* same company, reported in 5th Wallace, 681 and 689.

III.

This defendant denies each and every allegation contained in the fifth, sixth, and seventh paragraphs of said petition, except as herein expressly admitted. He admits that the said Wm. B. Welles, on or about the year 1878, conveyed a portion of said lands to Woolsey Welles, Alfred K. Welles, and Wm. B. Welles as trustees, and alleges that said trustees took the title to the land so conveyed them free and clear of all lien of plaintiff or his assignor for said taxes.

IV.

This defendant denies each and every allegation contained
12 in the ninth and tenth paragraphs of said petition.

V.

Further answering, defendant says there is a defect of parties' defendants; that Samuel E. Low, who resides in the State of New York, is the co-executor of the estate of Wm. B. Welles, deceased, with this defendant; that said executors were duly appointed by the surrogate's court of Kings county, N. Y., on the 21st day of October, 1878; that they duly qualified as such executors on the 28th day of April, 1879, duly gave notice of their appointment as required by law, and that all claims against said estate must be presented and filed with the surrogate, as the law requires; that the claim upon which this action is founded has never been presented to said executors for approval or payment; that the same has never been filed with said surrogate, as provided for by law; that on the 11th day of December, 1876, more than one year having expired from the granting of letters testamentary of said estate to said executors, and more than one year having elapsed from the giving of notice as aforesaid of their appointment as such executors, they made to said surrogate their application for a final settlement of their accounts as executors aforesaid, and a citation to all persons interested in said estate having been legally and duly made to attend before said surrogate upon such final settlement, such further proceedings were duly had; that upon the 11th day of December, 1879, their accounts and doings as such executors of said estate were duly presented to said surrogate and submitted to him for his decree, and thereupon the said surrogate, having examined said accounts, did order, adjudge, and decree that the same be and they were finally settled and allowed and said executors discharged.

VI.

Further answering, defendant says that if the said plaintiff or his assignors ever had any right or claim or cause of action against this defendant or against said estate for the recovery of said taxes
13 or any part thereof, that the same are now forever barred, more than twelve months having elapsed from the time of the giving of the notice of the appointment of said executors, as provided by statute, and the plaintiff having failed to file and prove his claim as required by law.

VII.

Further answering, defendant avers that the said several causes of action set up in plaintiff's petition herein occurred more than six years next before the commencement of this action, and that at all times since the date of payment of said taxes said William B. Welles was a citizen and resident of the State of New York, and that by the laws of the State of New York all causes of action based upon an express or implied promise not in writing are barred after the expiration of six years from the date when said causes of action severally accrued, and that the causes of action set out in plaintiff's petition herein are barred by the lapse of time under the laws of the State of New York.

VIII.

Further answering, says that by the laws of the State of New York it is enacted and provided that if a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof and the cause of action survives an action may be commenced against his executors or administrators after the expiration of that time and within one year after the issuing of letters testamentary or of administration; and defendant further avers that the said Wm. B. Welles died on the 12th day of August, 1878, and that letters of administration were issued on the 21st day of October, 1878, and that more than one year had elapsed from the issuing of said letters and the commencement of this suit, and that the same is barred by lapse of time under the laws of the State of New York.

IX.

And defendants, further answering, say that all and singular the taxes paid by the said Dubuque & Pacific Railroad Company upon said real estate were paid and said causes of action accrued
14 more than five years next before the commencement of his suit, and the same are now barred by the statutes of limitation of Iowa.

X.

That defendant, further answering, avers that at the time of the assessment and levy of the alleged taxes upon the lands described in said petition for the years 1861 and 1862 said lands belonged to

the United States, and the title thereto was in the United States; that said lands were not subject to taxation by Webster county for any purpose whatever for those years, and that if any taxes were assessed and levied thereon for the years aforesaid the same were not a valid and binding lien upon said lands.

XI.

Further answering, defendant says that in an action wherein the Iowa Homestead Co., the grantee of the assignor of plaintiff, was plaintiff and the Des Moines Navigation and Railroad Company and Wm. B. Welles, the defendant's decedent, and others are defendants, commenced in the district court of Webster county, Iowa, and finally determined in and by the Supreme Court of the United States, the said homestead company, prior to the date of the alleged assignment of the alleged causes of action set out in the petition herein, asserted, alleged, and maintained, among other things, the right to recover of the said Wm. B. Welles the taxes paid by the said Dubuque & Sioux City Railroad Company and the said Iowa Homestead Company upon the lands set out in the petition herein for certain years, being the same taxes sought to be recovered in this suit, and that one of the issues made by the pleadings in said cause and determined by the court in the same was as to the right of said homestead company to recover the taxes so paid by it and the assignor of plaintiff, and that it was determined, adjudged, and found by the said Supreme Court of the United States, at the December term thereof for 1872, that the said homestead company was not entitled to recover said taxes or any part thereof, which said determination has never been in any manner set aside, vacated, or modified, but the same remains and still is in full force and effect, and the defendant says that the assignor of the plaintiff had knowledge of the pendency of said suit and employed attorneys to prosecute the same, and that said suit was brought and prosecuted under the advice and direction of plaintiff's assignor, and that the plaintiff and his assignor are barred and estopped by said judgment from recovering from this defendant or the estate of the said Wm. B. Welles the taxes alleged to have been paid by plaintiff's assignor, and set out herein, or any part thereof.

XII.

That prior to the commencement of the suit herein mentioned, and subsequent to the payment of the taxes for which this suit is brought and before the assignment of the alleged cause of action herein to plaintiff, the said Dubuque & Sioux City Railroad Company had conveyed all its title and interest in said lands by warranty deed, containing, among other covenants, a covenant against incumbrances to the said Iowa Homestead Company, whereby it assigned all right and claim it then had to or on account of said taxes to the said homestead company, and plaintiff, as its assignee is estopped from claiming the same.

XIII.

16 Further answering, defendant says that the said Dubuque & Sioux City Railroad Company and the said Iowa Homestead Company, if they or either of them ever paid said taxes, as in said petition alleged, they paid the same voluntarily and without the request, knowledge, or consent of the said Wm. B. Welles, or any one having any right or interest in said lands, or in any part thereof, and with full knowledge of all the facts with respect to the claim of title thereto by the said Wm. B. Welles and his grantors.

Wherefore defendant prays the plaintiff's petition be dismissed, and that he gave judgment for his costs.

THEO. HAWLEY,
Defendants' Attorney.

Comes the defendants Woolsey, Welles, Alfred K. Welles, and William B. Welles, who are made defendants herein by amendment to plaintiff's petition, and for their answer thereto say:

I.

They deny each and every allegation contained in the first, second, and third paragraphs of said petition.

II.

Further answering, these defendants say that they deny each and every allegation contained in the fourth paragraph of said petition, except as herein expressly alleged. They aver that the title to said lands was definitely and finally decided at the December term of the Supreme Court of the United States for 1866 in the cases of Walcott *vs.* Des Moines Navigation and Railroad Company and Burr *vs.* Same company, reported in 5th Wallace, 681 and 689.

III.

Further answering, these defendants deny each and every allegation contained in the fifth, sixth, and seventh paragraphs
17 of said petition, except as hereinafter admitted and alleged.

IV.

Further answering, these defendants deny each and every allegation contained in the ninth and tenth paragrrphs of said petition.

V.

Further answering, defendants allege that the said Wm. B. Welles, in his lifetime, and on or about the 11th day of September, 1875, conveyed the lands mentioned and described in plaintiff's petition herein, except all of section 33, township 89 north, of range 28 west, of the 5th P. M., Iowa, to these defendants as trustees, to be held and disposed of by them for the benefit of certain donees mentioned in said deed of trust and according to the terms of said trust deed; that

they took the title under said conveyance free and clear of and from any lien for the taxes alleged to have been paid by plaintiff's assignor.

VI.

Further answering, defendants aver that the said several causes of action set up in plaintiff's petition herein accrued more than six years next before the commencement of this action, and that at all times since the date of the payment of said taxes said William B. Welles was a citizen and resident of the State of New York, and that by the laws of the State of New York all causes of action based upon an express or implied promise not in writing are barred after the expiration of six years from the date when said causes of action severally accrued, and that the causes of action set up in plaintiff's petition therein are barred by the lapse of time under the laws of the State of New York.

VII.

Further answering, defendants aver that all the taxes paid by plaintiff's assignor upon the lands set out and described in the petition herein were paid and said alleged causes of action accrued more than five years next before the commencement of this
18 action, and that the same are barred by lapse of time under the laws of Iowa.

VIII.

Further answering, defendants aver that at the time of the assessment and levy of the alleged taxes upon the lands described in said petition for the years 1861 and 1862 said lands belonged to the United States and the title thereto was in the United States; that said lands were not subject to taxation by Webster county for any purpose whatever for those years or either of them, and that if any taxes were assessed and levied thereon for those years the same were illegal and not a valid and binding lien upon said lands.

IX.

Further answering, these defendants aver that subsequent to the payment by it of the taxes upon said lands, as in the petition alleged, and before its alleged causes of action herein to plaintiff, said Dubuque and Sioux City Railroad Company conveyed all its title and interest in said lands by warranty deed, containing, among covenants, a covenant against incumbrances, to the said Iowa Homestead Company, whereby it assigned all right and claim it then had to or on account of said taxes to said homestead company, and plaintiff as its assignor is estopped from claiming the same.

X.

Further answering, defendants aver that on the — day of ——, 1863, plaintiff's assignor, the Dubuque and Sioux City Railroad Company, conveyed all of said lands by deed of general warranty,

containing covenants, among others a covenant against incumbrances, to the Iowa Homestead Company, a corporation created and existing under and by virtue of the laws of the State of Iowa; that in an action in which the said homestead company was plaintiff and the said William B. Welles and others were defendants, commenced in the district court in and for Webster county, Iowa, and finally determined in and by the Supreme Court of the United States, the said homestead company asserted and maintained, among other
19 things, the right to recover of the said William B. Welles the identical taxes the recovery of which is sought herein, together with other taxes, and that the alleged right of recovery of which was based upon the same right and title and state of facts and involves the same questions of facts and law as are raised and involved herein; that one of the issues made by the pleadings and sought to be maintained by the proofs in said cause, and which was determined by the court therein, was as to the right of said homestead company to recover said taxes, and that it was therein determined and adjudged finally by said Supreme Court of the United States, at the December term thereof, A. D. 1872, that the said homestead company was not entitled to recover the same or any part thereof, which said determination and judgment has never been in any manner set aside, vacated, or modified, and that the same still remains in full force and effect; that plaintiff's assignor, the Dubuque and Sioux City Railroad Company, had notice and full knowledge of the commencement and pendency of said action, and permitted and authorized the taxes on account of which a recovery is sought herein under its assignment to be sued for in that action in the name of said homestead company for the use of plaintiff's assignor, said Dubuque and Sioux City Railroad Company.

That said last-named company employed attorneys to prosecute said suit and paid the expenses of such litigation, and that the plaintiff herein and his assignor are barred and estopped by said judgment from recovering the taxes herein sought to be recovered or any part or portion of them.

XI.

Further answering, defendants aver that during the years from 1860 to 1865, both inclusive, adverse claims of title were made to said lands, the taxes on which are in controversy herein, by the Des Moines Navigation and Railroad Company and its grantees, claiming the same under the act of Congress of August 8, 1846, known as the "Des Moines River land grant," and the Dubuque & Pacific Railroad Company and its grantees, claiming the same lands under the act of Congress of May 15, 1856, known as the "railroad grant,"
20 and that by reason of such adverse claims of title thereto the title was held by the General Government for the purpose of adjusting and determining with respect to said conflicting claims, and the certification thereof under said last-mentioned act was suspended until April, 1863; that the claim of title to said lands by the plaintiff's assignors and its grantors, therefore, did not have its inception until the last-mentioned date, and the said lands

who are entirely too numerous to be made defendants to this suit. Wherefore plaintiff asks that he have judgment against said George W. Welles, as administrator of the estate of Wm. B. Welles, deceased, for the sum of forty-eight hundred dollars and not six thousand, as heretofore prayed, and that he be required to render a true
9 account of the personal assets in his hands; that said lands be sold to pay said judgment, and that all of said defendants be forever barred and foreclosed of all right and equity of redemption in and to said lands and every part thereof, and that he have such other and further relief in the premises as in equity and good conscience he may be entitled to and to the court may seem meet.

EDWARD K. GOODNOW,
By his Attorney, GEORGE CRANE.

And afterwards and on the — day of ——, 1882, the plaintiff filed another amendment as follows:

And now comes the plaintiff, Edward K. Goodnow, and for amendment to his petition heretofore filed, and, in addition thereto, says that J. P. Dolliver has also been appointed administrator of the goods and chattels and estate of the said Wm. B. Welles, deceased, by this court, and has entered upon the discharge of his duties as such administrator. Plaintiff therefore asks that said Dolliver be made defendant, and that plaintiff have and recover judgment against him as such administrator, for the sum of forty-eight hundred dollars and costs of suit.

GEORGE CRANE,
Attorney for Plaintiff.

And afterwards and on the — day of ——, 1883, the plaintiff filed another amendment, as follows:

And now comes the plaintiff in the above-entitled suit, and amends his petition herein and says that, since the commencement of his suit, he has transferred to George Crane one-fourth interest in the above suit, and hereby makes the said Crane a party plaintiff in this action.

EDWARD K. GOODNOW,
By his Attorney, GEORGE CRANE.

That afterwards and on the 21st day of May, 1883, the plaintiff filed another amendment, as follows:

And now comes George Crane and states to this court that
10 since the commencement of this suit he has become interested jointly with the plaintiff, Goodnow, who has assigned to said Crane one-fourth interest or right in said action, as copy of which assignment is herein set out in the words following:

For value received I hereby assign and transfer to George Crane one-fourth part of the claim or demand sued upon in the case of Edward K. Goodnow against George W. Welles, now pending in the

circuit court of the United States for the southern district of Iowa, and numbered on the docket 1932.

ED. K. GOODNOW.

That by virtue of said assignment said Crane became and is jointly interest with the plaintiff, Goodnow, in the prosecution of said claim, and therefore asks to be made a party plaintiff in said action.

GEORGE CRANE, *Pro. Se.*

And afterwards and on the 5th day of June, 1883, the defendants filed the following

Motion.

Comes now the defendant and shows unto the court that this action was originally commenced against George W. Welles as executor of Wm. B. Welles, deceased, under an appointment as such executor by the circuit court of Webster county, Iowa; that by an amendment subsequently filed the plaintiff has made J. P. Dolliver defendant, alleging that he has been appointed administrator of the estate of said Wm. B. Welles, deceased, by the circuit court of Webster county, Iowa; that there is no allegation in said petition or amendment that the said George W. Welles has been removed and his appointment vacated. The defendant, therefore, moves the court to require the plaintiff to elect against which of said representatives of said estate he will further prosecute this action and that the same may be dismissed as against the other.

THEO. HAWLEY,
Defendant's Attorney.

And afterwards, to wit, on the 6th day of June, 1883, the
11 plaintiff filed another amendment, as follows:

And now comes the plaintiff, Ed. K. Goodnow, and for amendments to his petitions heretofore, and in addition thereto, says that the claim sued upon was presented to the administrator, J. P. Dolliver, before he was made party to this suit, and he refused to pay the same, wherefore plaintiff asks judgment as heretofore prayed.

GEORGE CRANE,
Attorney for Plaintiff.

And afterwards and on the 29th day of August, 1883, the defendants filed their answers.

The defendant, George W. Welles, for answer to the petition and amendments thereto of the plaintiff, says:

I.

He denies each and every allegation contained in first, second, and third paragraphs of said petition.

II.

He denies each and every allegation contained in fourth paragraph thereof, except as herein expressly alleged. He avers that the title to said lands was definitely and finally decided at the December term, 1866, of the Supreme Court of the United States, in the case of Wolcott *vs.* Des Moines Navigation & R. R. Co. and Burr *vs.* same company, reported in 5th Wallace, 681 and 689.

III.

This defendant denies each and every allegation contained in the fifth, sixth, and seventh paragraphs of said petition, except as herein expressly admitted. He admits that the said Wm. B. Welles, on or about the year 1878, conveyed a portion of said lands to Woolsey Welles, Alfred K. Welles, and Wm. B. Welles as trustees, and alleges that said trustees took the title to the land so conveyed them free and clear of all lien of plaintiff or his assignor for said taxes.

IV.

This defendant denies each and every allegation contained
12 in the ninth and tenth paragraphs of said petition.

V.

Further answering, defendant says there is a defect of parties' defendants; that Samuel E. Low, who resides in the State of New York, is the co-executor of the estate of Wm. B. Welles, deceased, with this defendant; that said executors were duly appointed by the surrogate's court of Kings county, N. Y., on the 21st day of October, 1878; that they duly qualified as such executors on the 28th day of April, 1879, duly gave notice of their appointment as required by law, and that all claims against said estate must be presented and filed with the surrogate, as the law requires; that the claim upon which this action is founded has never been presented to said executors for approval or payment; that the same has never been filed with said surrogate, as provided for by law; that on the 11th day of December, 1876, more than one year having expired from the granting of letters testamentary of said estate to said executors, and more than one year having elapsed from the giving of notice as aforesaid of their appointment as such executors, they made to said surrogate their application for a final settlement of their accounts as executors aforesaid, and a citation to all persons interested in said estate having been legally and duly made to attend before said surrogate upon such final settlement, such further proceedings were duly had; that upon the 11th day of December, 1879, their accounts and doings as such executors of said estate were duly presented to said surrogate and submitted to him for his decree, and thereupon the said surrogate, having examined said accounts, did order, adjudge, and decree that the same be and they were finally settled and allowed and said executors discharged.

VI.

Further answering, defendant says that if the said plaintiff or his assignors ever had any right or claim or cause of action against this defendant or against said estate for the recovery of said taxes
13 or any part thereof, that the same are now forever barred, more than twelve months having elapsed from the time of the giving of the notice of the appointment of said executors, as provided by statute, and the plaintiff having failed to file and prove his claim as required by law.

VII.

Further answering, defendant avers that the said several causes of action set up in plaintiff's petition herein occurred more than six years next before the commencement of this action, and that at all times since the date of payment of said taxes said William B. Welles was a citizen and resident of the State of New York, and that by the laws of the State of New York all causes of action based upon an express or implied promise not in writing are barred after the expiration of six years from the date when said causes of action severally accrued, and that the causes of action set out in plaintiff's petition herein are barred by the lapse of time under the laws of the State of New York.

VIII.

Further answering, says that by the laws of the State of New York it is enacted and provided that if a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof and the cause of action survives an action may be commenced against his executors or administrators after the expiration of that time and within one year after the issuing of letters testamentary or of administration; and defendant further avers that the said Wm. B. Welles died on the 12th day of August, 1878, and that letters of administration were issued on the 21st day of October, 1878, and that more than one year had elapsed from the issuing of said letters and the commencement of this suit, and that the same is barred by lapse of time under the laws of the State of New York.

IX.

And defendants, further answering, say that all and singular the taxes paid by the said Dubuque & Pacific Railroad Company upon said real estate were paid and said causes of action accrued
14 more than five years next before the commencement of his suit, and the same are now barred by the statutes of limitation of Iowa.

X.

That defendant, further answering, avers that at the time of the assessment and levy of the alleged taxes upon the lands described in said petition for the years 1861 and 1862 said lands belonged to

the United States, and the title thereto was in the United States; that said lands were not subject to taxation by Webster county for any purpose whatever for those years, and that if any taxes were assessed and levied thereon for the years aforesaid the same were not a valid and binding lien upon said lands.

XI.

Further answering, defendant says that in an action wherein the Iowa Homestead Co., the grantee of the assignor of plaintiff, was plaintiff and the Des Moines Navigation and Railroad Company and Wm. B. Welles, the defendant's decedent, and others are defendants, commenced in the district court of Webster county, Iowa, and finally determined in and by the Supreme Court of the United States, the said homestead company, prior to the date of the alleged assignment of the alleged causes of action set out in the petition herein, asserted, alleged, and maintained, among other things, the right to recover of the said Wm. B. Welles the taxes paid by the said Dubuque & Sioux City Railroad Company and the said Iowa Homestead Company upon the lands set out in the petition herein for certain years, being the same taxes sought to be recovered in this suit, and that one of the issues made by the pleadings in said cause and determined by the court in the same was as to the right of said homestead company to recover the taxes so paid by it and the assignor of plaintiff, and that it was determined, adjudged, and found by the said Supreme Court of the United States, at the December term thereof for 1872, that the said homestead company was not entitled to recover said taxes or any part thereof, which said determination has never been in any manner set aside, vacated, or modified, but the same remains and still is in full force and effect, and the defendant says that the assignor of the plaintiff had knowledge of the pendency of said suit and employed attorneys to prosecute the same, and that said suit was brought and prosecuted under the advice and direction of plaintiff's assignor, and that the plaintiff and his assignor are barred and estopped by said judgment from recovering from this defendant or the estate of the said Wm. B. Welles the taxes alleged to have been paid by plaintiff's assignor, and set out herein, or any part thereof.

XII.

That prior to the commencement of the suit herein mentioned, and subsequent to the payment of the taxes for which this suit is brought and before the assignment of the alleged cause of action herein to plaintiff, the said Dubuque & Sioux City Railroad Company had conveyed all its title and interest in said lands by warranty deed, containing, among other covenants, a covenant against incumbrances to the said Iowa Homestead Company, whereby it assigned all right and claim it then had to or on account of said taxes to the said homestead company, and plaintiff, as its assignee is estopped from claiming the same.

XIII.

16 Further answering, defendant says that the said Dubuque & Sioux City Railroad Company and the said Iowa Homestead Company, if they or either of them ever paid said taxes, as in said petition alleged, they paid the same voluntarily and without the request, knowledge, or consent of the said Wm. B. Welles, or any one having any right or interest in said lands, or in any part thereof, and with full knowledge of all the facts with respect to the claim of title thereto by the said Wm. B. Welles and his grantors.

Wherefore defendant prays the plaintiff's petition be dismissed, and that he gave judgment for his costs.

THEO. HAWLEY,
Defendants' Attorney.

Comes the defendants Woolsey, Welles, Alfred K. Welles, and William B. Welles, who are made defendants herein by amendment to plaintiff's petition, and for their answer thereto say:

I.

They deny each and every allegation contained in the first, second, and third paragraphs of said petition.

II.

Further answering, these defendants say that they deny each and every allegation contained in the fourth paragraph of said petition, except as herein expressly alleged. They aver that the title to said lands was definitely and finally decided at the December term of the Supreme Court of the United States for 1866 in the cases of Walcott *vs.* Des Moines Navigation and Railroad Company and Burr *vs.* Same company, reported in 5th Wallace, 681 and 689.

III.

Further answering, these defendants deny each and every allegation contained in the fifth, sixth, and seventh paragraphs
17 of said petition, except as hereinafter admitted and alleged.

IV.

Further answering, these defendants deny each and every allegation contained in the ninth and tenth paragrrphs of said petition.

V.

Further answering, defendants allege that the said Wm. B. Welles, in his lifetime, and on or about the 11th day of September, 1875, conveyed the lands mentioned and described in plaintiff's petition herein, except all of section 33, township 89 north, of range 28 west, of the 5th P. M., Iowa, to these defendants as trustees, to be held and disposed of by them for the benefit of certain donees mentioned in said deed of trust and according to the terms of said trust deed; that

they took the title under said conveyance free and clear of and from any lien for the taxes alleged to have been paid by plaintiff's assignor.

VI.

Further answering, defendants aver that the said several causes of action set up in plaintiff's petition herein accrued more than six years next before the commencement of this action, and that at all times since the date of the payment of said taxes said William B. Welles was a citizen and resident of the State of New York, and that by the laws of the State of New York all causes of action based upon an express or implied promise not in writing are barred after the expiration of six years from the date when said causes of action severally accrued, and that the causes of action set up in plaintiff's petition therein are barred by the lapse of time under the laws of the State of New York.

VII.

Further answering, defendants aver that all the taxes paid by plaintiff's assignor upon the lands set out and described in the petition herein were paid and said alleged causes of action accrued more than five years next before the commencement of this
18 action, and that the same are barred by lapse of time under the laws of Iowa.

VIII.

Further answering, defendants aver that at the time of the assessment and levy of the alleged taxes upon the lands described in said petition for the years 1861 and 1862 said lands belonged to the United States and the title thereto was in the United States; that said lands were not subject to taxation by Webster county for any purpose whatever for those years or either of them, and that if any taxes were assessed and levied thereon for those years the same were illegal and not a valid and binding lien upon said lands.

IX.

Further answering, these defendants aver that subsequent to the payment by it of the taxes upon said lands, as in the petition alleged, and before its alleged causes of action herein to plaintiff, said Dubuque and Sioux City Railroad Company conveyed all its title and interest in said lands by warranty deed, containing, among covenants, a covenant against incumbrances, to the said Iowa Homestead Company, whereby it assigned all right and claim it then had to or on account of said taxes to said homestead company, and plaintiff as its assignor is estopped from claiming the same.

X.

Further answering, defendants aver that on the — day of ——, 1863, plaintiff's assignor, the Dubuque and Sioux City Railroad Company, conveyed all of said lands by deed of general warranty,

containing covenants, among others a covenant against incumbrances, to the Iowa Homestead Company, a corporation created and existing under and by virtue of the laws of the State of Iowa; that in an action in which the said homestead company was plaintiff and the said William B. Welles and others were defendants, commenced in the district court in and for Webster county, Iowa, and finally determined in and by the Supreme Court of the United States, the said homestead company asserted and maintained, among other things, the right to recover of the said William B. Welles
19 the identical taxes the recovery of which is sought herein, together with other taxes, and that the alleged right of recovery of which was based upon the same right and title and state of facts and involves the same questions of facts and law as are raised and involved herein; that one of the issues made by the pleadings and sought to be maintained by the proofs in said cause, and which was determined by the court therein, was as to the right of said homestead company to recover said taxes, and that it was therein determined and adjudged finally by said Supreme Court of the United States, at the December term thereof, A. D. 1872, that the said homestead company was not entitled to recover the same or any part thereof, which said determination and judgment has never been in any manner set aside, vacated, or modified, and that the same still remains in full force and effect; that plaintiff's assignor, the Dubuque and Sioux City Railroad Company, had notice and full knowledge of the commencement and pendency of said action, and permitted and authorized the taxes on account of which a recovery is sought herein under its assignment to be sued for in that action in the name of said homestead company for the use of plaintiff's assignor, said Dubuque and Sioux City Railroad Company.

That said last-named company employed attorneys to prosecute said suit and paid the expenses of such litigation, and that the plaintiff herein and his assignor are barred and estopped by said judgment from recovering the taxes herein sought to be recovered or any part or portion of them.

XI.

Further answering, defendants aver that during the years from 1860 to 1865, both inclusive, adverse claims of title were made to said lands, the taxes on which are in controversy herein, by the Des Moines Navigation and Railroad Company and its grantees, claiming the same under the act of Congress of August 8, 1846, known as the "Des Moines River land grant," and the Dubuque & Pacific Railroad Company and its grantees, claiming the same lands under the act of Congress of May 15, 1856, known as the "railroad grant," and that by reason of such adverse claims of title thereto
20 the title was held by the General Government for the purpose of adjusting and determining with respect to said conflicting claims, and the certification thereof under said last-mentioned act was suspended until April, 1863; that the claim of title to said lands by the plaintiff's assignors and its grantors, therefore, did not have its inception until the last-mentioned date, and the said lands

could not have become subject to taxation under said last-mentioned act and their certification thereunder had they been held to pass under the grant thereby made, and therefore the defendants say that the payment of the taxes thereon for the said years was both voluntary and officious.

21 XII.

That if said Dubuque and Sioux City Railroad Company or said Iowa Homestead Company, or either of them, ever paid said taxes as in said petition alleged, they paid the same voluntarily and without any request, knowledge, or consent of the said Wm. B. Welles or any one having any right or interest in said lands or in any part thereof, and with full knowledge of all the facts with respect to the claim of title thereto by the said Wm. B. Welles and his grantors. Wherefore defendants pray that plaintiff's petition be dismissed, and that they have judgment for their costs.

THEO. HAWLEY,
Defendants' Attorney.

Comes now the defendant, *of* J. P. Dolliver, and for answer to the petition of plaintiff herein says:

I.

Defendant denies each and every allegation contained in the first, third, seventh, and eighth paragraphs of said petition.

II.

22 Defendant denies each and every allegation contained in the second paragraph of said petition, except as herein alleged. He alleges that the title to said lands as between the grantors of said Welles and the assignor of plaintiff was definitely and finally decided at the December term, 1866, of the Supreme Court of the United States, in the case of Walcott *vs.* The Des Moines Navigation and Railroad Company, and Burr *vs.* Same Company, reported in 5th Wallace, 681 and 689.

III.

Defendant denies each and every allegation contained in the fourth paragraph of said petition, except as herein admitted. He admits that on the — day of ——, 18—, the said Wm. B. Welles became the owner of said lands.

IV.

Further answering, defendant says he has no knowledge or information as to the truth of the allegations contained in the fifth and sixth paragraphs of said petition, and he denies the same and asks that plaintiff be required to make proof thereof.

V.

Defendant, further answering, says that if said plaintiff or his assignor ever had any right or cause of action against the said Wm. B. Welles for the recovery of said taxes or any part thereof said cause of action arose or accrued to the said plaintiff and his assignor more than five years before the commencement of this action, and the same is now barred by the lapse of time.

VI.

Further answering, defendant says that the said several causes of action set out in plaintiff's petition herein accrued more than six years next before the commencement of this action, and that at all times since the dates of the payment of said taxes and up to the time of his death the said Wm. B. Welles was a citizen and resident of the State of New York, and that by the laws of the State of New York all causes of action based upon an express or implied promise not in writing are barred after the expiration of six years
23 from the date when said cause of action severally accrued, and that the causes of action set out in plaintiff's petition herein are barred by the lapse of time under the laws of the State of New York.

VII.

Further answering, defendant avers that if the said Dubuque and Sioux City Railroad Company ever paid the taxes as in said petition alleged it paid the same voluntarily and without the request, knowledge, or consent of the said Wm. B. Welles or any one having any right or interest in said lands or any *fact* thereof, and with full knowledge of all the facts with respect to the claim of title thereto by the said Welles and his grantors.

VIII.

Further answering, defendant says that in an action wherein the Iowa Homestead Company, the assignor of plaintiff, was plaintiff and the said Wm. B. Welles and others were defendants, commenced in the district court of Webster county, Iowa, and which was by said defendants removed for trial into the circuit court of the United States for the district of Iowa, and finally determined in and by the Supreme Court of the United States, the said homestead company, prior to the date of the alleged assignment of the alleged cause of action set out in the petition herein, asserted, alleged, and maintained, among other things, the right to recover of the said Wm. B. Welles the taxes paid by the said homestead company upon the lands set out in the petition herein for certain years, being the same taxes sought to be recovered in this suit, and that one of the issues made by the pleadings in said cause and determined by the proofs in the same was as to the right of the said homestead company to recover the taxes so paid by it, and that it was determined, ordered, and adjudged by the said Supreme Court of the United

States, at the December term thereof for 1872, that the said homestead company was not entitled to recover said taxes or any part thereof, which said determination, order, and judgment has never been in any manner set aside, vacated, or modified, but the same remains and still is in full force and effect, and this defend-
24 ant says that by reason thereof the assignor of plaintiff and the plaintiff herein are barred and estopped by said judgment from recovery from this defendant or from the estate of the said Wm. B. Welles the taxes alleged to have been paid by plaintiff's assignor and set out in the petition herein, or in any part thereof.

IX.

Further answering, this defendant alleges that in an action wherein the Iowa Homestead Company, the assignor of plaintiff, was plaintiff and the County of Webster was defendant, commenced in and finally determined by the judgment of the district court of Webster county, Iowa, the said homestead company, prior to the date of the alleged assignment of the pretended cause of action set out in the petition herein, asserted, alleged, and maintained, among other things, the right to recover of the said Webster county certain portions of the taxes paid by it to said county on the lands set out in the petition herein for the years 1866, 1867, 1868, 1869, 1870, and 1871, on the ground that said county had no right or authority to levy and collect the same, and that in said suit it was determined, adjudged, and found by said court that said homestead company, at the —— term thereof for 18—, was entitled to recover of and from said county the sum of about three thousand dollars for and on account of the said taxes it had so paid upon said land, and therefore judgment was rendered in said cause in favor of said homestead company and against said Webster county for the sum of $3,000 or thereabouts, which judgment was subsequently paid by said county to said company; and defendant alleges that if it shall be adjudged that the plaintiff is entitled to recover for and on account of the taxes in his said petition herein alleged to have been paid, then that the amount so recovered by this assignor of said county and paid by said county should be deducted from the amount herein claimed and that he have judgment for the balance thereof.

X.

Further answering, defendant says that at the time of the
25 death of William B. Welles he had no property, real or personal, within the State of Iowa, and that since his death no property or assets belonging to said estate has come into or been found within the State of Iowa, and there has — been and is not now any estate to be administered upon by this defendant.

26 XI.

Further answering, this defendant adopts and makes a part of his answer the allegation contained in the fifth, sixth, seventh, and

eighth paragraphs of the answer of his codefendant, Geo. W. Welles, filed herein. Wherefore defendant prays judgment against plaintiff, that his petition be dismissed, and for judgment for costs.

J. P. DOLLIVER,
By THEO. HAWLEY,
His Attorney.

And afterwards, on the — day of December, this cause coming on for hearing, the same was submitted to the court on the foregoing pleadings and the following agreed statement of facts and evidence, to wit:

Agreed Statement of Facts Offered by Plaintiff.

For the purpose of the trial of the above-entitled suit it is hereby stipulated and agreed:

I.

That the defendant, George W. Welles, was duly appointed
27 one of the executors of the estate of Wm. B. Welles, deceased, by the court of surrogate of the county of Kings and State of New York; that the said defendant, George W. Welles, is now and always has been, and the said Wm. B. Welles in his lifetime was, always a non-resident of the State of Iowa.

II.

That the county of Webster, in the usual and formal manner, levied and assessed upon the lands mentioned in the plaintiff's petition, for the years named, the several amounts of taxes set forth in Exhibit "A," hereto attached and made part hereof, and said several assessments were made by said county to unknown owners. This is not a confession that the lands were subject to taxation for said years.

III.

That the Dubuque and Sioux City Railroad Company paid to said county the several amounts of money mentioned in said Exhibit "A" at the several dates therein set forth and took from said county receipts for the sums of money as paid in the usual form as for taxes. It is understood that the defendant shall have the right to have Exhibit "A" corrected to conform to the facts, if found in any respect erroneous, and for that purpose defendant may read in evidence copies of deeds from the real estate records of Webster county, Iowa.

IV.

That said several sums of money were so paid to said county without any actual demand or request by said county therefor.

V.

That said defendant has never paid said taxes to said county, or any part thereof, and said county has always hitherto refused to re-

fund to said railroad company or to said plaintiff Goodnow the money paid as aforesaid.

VI.

That the lands mentioned in plaintiff's petition are part of the lands purported to be conveyed by the Dubuque and Sioux
28 City Railroad Company by a deed of general warranty to the Iowa Homestead Company given to said company in November, A. D. 1863, and also a part of the lands in controversy in the suit of The Iowa Homestead Company *vs.* The Des Moines Navigation and Railroad Company *et al.*, in 17 Wallace, 153.

VII.

That the reports of the cases of The Dubuque and Pacific Railroad Company *vs.* Edwin C. Litchfield, in 23 Howard, 66, The Iowa Homestead Company *vs.* The Des Moines Valley Railroad Company, in 17 Wallace, 153, and Walcott *vs.* The Des Moines Navigation and Railroad Company, 5 Wallace, 681, as reported therein, shall be received as evidence by the court as far as competent and material to any of the issues herein.

VIII.

That the printed transcript of the record in the Supreme Court of the United States in said case of The Iowa Homstead Company *vs.* The Des Moines Valley Railroad Company may be received as evidence and considered by the court with like effect as the original might be so far as material to any of the issues herein, either party having the right to offer in evidence such portions as he may deem relevant and material.

IX.

That the costs of Exhibit "A" shall be taxed upon the costs of this suit.

X.

That all the lands described in the petition be within five miles of the Des Moines river in the alternate, odd-numbered sections, above the Raccoon Fork of said river, and were, prior to May 3rd, 1858, certified and approved to the State of Iowa, under the act of Congress of August 8, 1846, entitled "An act granting certain lands to the Territory of Iowa to aid in the improvement of the navigation of the Des Moines river in said Territory.

XI.

That on the 3rd day of May, 1858, pursuant to a contract for the sale thereof previously made and an act of the Gen-
29 eral Assembly of Iowa, passed March 22nd, 1858, entitled "An act disposing of the grant of land made by an act of Congress granting land to the Territory of Iowa to aid in the improvement of the navigation of the Des Moines river," and a joint

resolution containing propositions for settlement with the Des Moines Navigation and Railroad Company, the State of Iowa executed and delivered a deed of conveyance for all of said lands to the Des Moines Navigation and Railroad Company, a corporation duly organized, erected, and established under the laws of the State of Iowa, and subsequently thereto, and prior to the year 1860, said company executed and delivered a deed of conveyance for all of said lands to the said Wm. B. Welles, now deceased.

XII.

That said Wm. B. Welles, deceased, and his grantors, prior to March 2nd, 1861, claimed title in fee simple to all of said lands under said act of Congress of August 8, 1846, and the certification, approval, and conveyance aforesaid, and constantly since March 2nd, 1861, have claimed title to said lands under the joint resolution of Congress of that date. Said Wm. B. Welles, deceased, was a *bona fide* purchaser of said lands under the State of Iowa, as contemplated under the joint resolution of Congress, approved March 2nd, 1861. Any documents contained in the record of the case of Dumont *vs.* The Des Moines Valley Railroad Company may be read in evidence the same as though originals duly certified, so far as otherwise competent and relevant.

XIII.

That, prior to the year A. D. 1861, The Dubuque & Pacific Railroad Company and the Dubuque & Sioux City Railroad Company had completed and were operating in accordance with the terms of the grant seventy miles of railroad, commencing at the city of Dubuque, Iowa, and extending west the distance aforesaid; that said railroad was so built and operated in pursuance of and in accordance with the act of Congress, approved May 15, 1856, donating land to the State of Iowa to aid in the construction of said railroad from Dubuque to the Missouri river near Sioux City, in the State of Iowa, and of the act of the Legislature of Iowa, approved July 14, 1856, granting said lands to said Dubuque & Pacific Railroad Company, and that the construction of said part of said railroad was duly and properly certified to by the Governor of the State of Iowa before the date aforesaid; that all the lands falling within the limits of said grant of May 15, 1856, and being east of range thirty-one in the said State of Iowa, and subject to the terms of said grant, including all the lands within five miles of the Des Moines river in odd-numbered sections, did not amount to more than 226,559 acres. This last amount includes the fifty thousand acres of land in the odd-numbered sections within five miles of the Des Moines river, which the courts held were no part of said land grant of May 15, 1856. The defendant shall have the right to show that said taxes were paid by the Iowa Homestead Company, and to object to the competency or materiality of any of the facts herein stated.

XIV.

That the defendant, George W. Welles, is now and has been since the year 1860, and the said Wm. B. Welles in his lifetime was, always a citizen and resident of the State of New York.

XV.

That the statute and laws of the State of New York now in force, and which have been in force since 1860, provide that all causes of action based on or arising out of an express or implied promise not in writing are barred after the expiration of six years from the date when said causes of action severally occurred.

XVI.

That on the hearing and trial of these causes the defendant may offer and read in evidence from the journal of the board of supervisors of Webster county and the tax lists of said county such
31 portions thereof as he may deem relevant and material, subject to all objection by plaintiff as to their relevancy, materiality, or competency.

XVII.

That the said Wm. B. Welles, deceased, through his agent, Woolsey Welles, during the years mentioned in the petition herein, applied yearly to the treasurer of Webster county, Iowa, to pay the taxes levied or assessed upon the land in said petition described, and found those mentioned and described in Plaintiff's Exhibit "A" marked paid upon the tax lists for those years, respectively. It is understood that by signing this agreement plaintiff does not waive his right to object to the introduction of the foregoing facts on the ground of irrelevancy, incompetency, or that it is too late—the cause having been tried in the supreme court of Iowa.

XVIII.

It is further admitted that on or about the 13th day of February A. D. 1883, one J. P. Dolliver, of Fort Dodge, Webster county, Iowa, was appointed by the circuit court of said county administrator of the estate of said Wm. B. Welles, deceased, and that he has entered upon the discharge of his duties as such administrator.

Signed September —, A. D. 1883.

GEORGE CRANE,
Attorney for Plaintiff.
THEO. HAWLEY,
Defendants' Attorney.

EXHIBIT "A." Referred to in the agreed statement of facts.

For the year.	Amount paid.	Time of payment.
1861	$1,527 04	October 31st, 1866.
1862	596 22	December 9th, 1863.
1863	454 02	January 20th, 1864.

The plaintiff then offered in evidence the following instrument:

This agreement witnesseth:

That in consideration of the covenants and agreements hereinafter mentioned and to be kept, observed, and performed by
32 Edward K. Goodnow, of the city and State of New York, the Dubuque and Sioux City Railway Company, a corporation organized and existing under the laws of the State of Iowa, has assigned, transferred, conveyed, and set over, and by these presents does assign, transfer, convey, and set over, unto the said E. K. Goodnow all right, title, claim or demand, or cause of action, either in law or equity, which said railroad may have against any person, company, or corporation on account of or by reason of its payment to Webster county, in the State of Iowa, of any taxes assessed or levied by said county upon lands situated within the territorial limits thereof, and in which said railroad company heretofore had or claimed to have an interest or title, and expressly all claims, demands, and rights of action in law or equity which said railroad company may have or hold against any person, company, or corporation by virtue of said railroad company having paid or handed over in and for the years 1861, 1862, 1863, and 1864 to said county of Webster the taxes assessed and levied by said county upon the lands or any part thereof formerly claimed by said railroad company as part of the lands granted by Congress to aid in the construction of its railroad, and located within five miles of the Des Moines river, in said county, but which were finally adjudged by the courts to be no part of said land grant, and does hereby authorize the said Goodnow to enforce said claims, demands, or rights of action by suits in his own name.

In consideration whereof the said E. K. Goodnow now hereby agrees to use or exercise reasonable care and diligence to enforce said claims, demands, or rights of action, and, after deducting all costs and expenses incurred in so doing, to hold the proceeds or amounts collected in trust for the use and benefit of the parties owning the same.

Signed by the respective parties hereto.

E. K. GOODNOW.
DUBUQUE & SIOUX CITY R. R. CO.,
By W. K. JESUP.
J. B. DUMONT, *Assistant Secretary.*

STATE OF NEW YORK, }
New York City and County, } *ss:*

On this 8th day of April, 1881, before me, a notary public
33 in and for said county, personally came W. K. Jesup, president of the Dubuque & Sioux City Railroad Company, and John B. Dumont, secretary of said company, to me personally known to be the identical persons whose names are affixed to the above instrument as grantors and as officers of said company, and acknowledged the same to be their voluntary act and deed and the volun-

tary act and deed of said railroad company for the uses and purposes therein mentioned.

Witness my hand and official seal.

[NOTARIAL SEAL.] J. C. FRENCH,
Notary Public, Kings Co.

Certified in J. P. court.

To the introduction in evidence of the foregoing assignment the defendants objected as follows:

Because it is incompetent and immaterial.

2nd. There is no evidence that the party signing it had any authority to execute it on the part of the company, and there is no proof of the genuineness of his signature thereto and no proof that the execution of the same was authorized by any order or resolution of the board of directors of the company.

That the party signing it had no authority to execute it without such previous order or resolution of the company or of the board of directors of the company.

The court overruled said objection and received said evidence; to all which defendants duly excepted.

The plaintiff next offered in evidence the following conveyance:

This indenture, made and entered into this tenth day of September, in the year of our Lord one thousand eight hundred and seventy-three, between William B. Welles, of the city, county, and State of New York, of the first part, and Woolsey Welles, of Fort Dodge, Webster county, Iowa, and Alfred K. Welles and Wm. B. Welles, Montana, Boone county, Iowa, of the second part, witnesseth:

That the said party of the first part, in consideration of the execution of the trusts hereinafter set forth and of the sum of
34 one dollar, lawful money of the United States, to him in hand paid by the said parties of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, and sold, aliened, remised, released, conveyed, and confirmed, and by these presents does grant, bargain, sell, alien, remise, release, convey, and confirm, unto the said parties of the second part, and to the survivor or survivors of either of them, all of the following-described real estate and lands situated and being in Webster county, in the State of Iowa, subject, however, to the terms and conditions of any contract in writing which has been made with any actual settler upon or occupant of any lot or parcel of a lot of the lands herein described for the sale to him of the said lot by Woolsey Welles, of Fort Dodge, in Iowa, as any agent or attorney, viz:

(Here follows a description of all the lands in plaintiff's petition described except section 33, township 89, range 28.)

Together with all and singular the tenements and hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents,

issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, and to the above-described premises and every part and parcel thereof, with the appurtenances, unto the said Woolsey Welles, Alfred K. Welles, and William B. Welles, of Montana, Boone county, Iowa, in trust, nevertheless, to and for the following uses, interests, and purposes—that is to say:

First. The parties of the second part shall enter upon and take possession of all and singular the said lands, tenements, hereditaments, and property hereby granted and conveyed, and without unreasonable delay and with all convenient dispatch under all circumstances sell and dispose of the same by tracts and parcels upon such terms and considerations as, in their judgment, may appear best, either for cash or upon credit in part, and therefor execute, acknowledge, and deliver in their own proper names conveyances to the purchaser or purchasers, in all cases, however, securing deferred
35 payments where tracts are sold in whole or in part upon credit by mortgage of the respective tracts sold to the respective purchasers, or upon other adequate real estate, and in case of the death or resignation of either of the trustees herein named the survivor or survivors shall have full power to execute the trusts hereby created.

Second. Description of now proceeds are to be employed and of parties benefited by said trusts.

In witness whereof I have hereunto set my hand and seal the day and year first above written.

WILLIAM B. WELLES. [L. S.]

Duly acknowledged September 12th, 1873.

Plaintiff rests.

The defendants, to maintain the issues upon their part, offered and read in evidence the following agreed statements of facts.

For the benefit of all parties to this suit, it is hereby stipulated and agreed as follows:

I.

That at the time of his death Wm. B. Welles was a resident of Kings county, New York, and had been a resident thereof for ten years prior thereto; that he died in said county on the 12th day of August, 1878, leaving a last will, wherein he appointed the defendant, George W. Welles, and one Samuel E. Leno, his executors; that his will was probated before the surrogate of said county, and on the 21st day of October, 1878, said surrogate issued to said Geo. W. Welles and Samuel E. Leno letters of administration upon the estate of said Wm. B. Welles, deceased; that they immediately qualified and gave due notice of their appointment as such executors; that at the expiration of six months from the granting said letters testamentary said executors caused to be published, under the order of said surrogate, a notice, and in each week for six months, in the

Brooklyn Daily Union-Argus, a newspaper printed and published in the city of Brooklyn, in the county of Kings, New York, for claimants to present their claims against the said estate of
36 Wm. B. Welles, as required by law, to said executors, at their office, No. 192 Baltic street, Brooklyn, N. Y.; that the claim or demand upon which this action was brought was never presented to the executors or either of them for allowance or payment; was never filed with said executors or with said surrogate, either by the plaintiff or his assignor, or by any other person for them or either of them; that after the expiration of one year after their said appointment and on the 11th day of December, 1879, said executors, in compliance with an order of said surrogate, presented their final account for settlement, and on the same day their said account of their doings as such executors *were* examined, approved, and allowed by said surrogate, the same showing said estate had been fully administered upon, and a decree entered discharging said executors.

That from the first day of August, 1878, to the first day of January, 1880, the plaintiff was a resident of the city of Brooklyn, Kings county, New York.

That the said Wm. B. Welles, deceased, was at the time of his death, and had been since the year 1860, a citizen resident of the State of New York.

That the statutes and laws of the State of New York now in force and which have been in force since 1860 provide that all causes of action based on or arising out of an express or implied promise not in writing are barred after the expiration of six years from the date when said causes of action severally occurred.

That the statute and laws of the State of New York now in force and which have been in force since 1866 provide that if a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof and the cause of action survives an action may be commenced against his executor or administrator after the expiration of that time and within one year after the issuing of letters testamentary or of administration.

That this action was commenced against Geo. W. Welles, executor, &c., by the service upon him of the original notice herein, in the city of New York, on the 29th day of April, 1881.

37 That the printed transcript of the record in the Supreme Court of the United States in the case of the Iowa Homestead Company *vs.* The Des Moines Navigation and Railroad Company and others may be received as evidence and considered by the court with like effect as the original might be, so far as material to any of the issues herein, either party having the right to offer in evidence such portions as he may deem relevant and material.

That on the 12th day of November, 1863, the Dubuque & Pacific Railroad Company conveyed to the Iowa Homestead Company by deed of general warranty, with covenants against incumbrances, all the lands mentioned in the plaintiff's petition herein.

That all the taxes paid on said lands by the assignor of plaintiff were paid by it without any actual request so to do by the said Wm.

B. Welles, or any one for him, and were so far voluntarily paid by said assignor.

That the printed transcript of the evidence in the circuit court of the United States for the southern district of Iowa in the case of Edwin C. Litchfield *vs.* The County of Webster, in the State of Iowa, and Jonathan Hutchison, treasurer, and which record is marked Exhibit " D," in the case of Edward K. Goodnow *vs.* Edwin C. Litchfield *et al.*, in Webster county circuit court, may be received as evidence and considered by the court with like effect as the original might be, so far as material to the issues herein, either party having the right to offer in evidence such portions as he may deem relevant and material.

That all the lands mentioned and described in plaintiff's petition herein, except section thirty-three, township 39, range 28, was conveyed by the said Wm. B. Welles in deed, dated and delivered on the 10th day of September, 1873, to Woolsey Welles, Alfred K. Welles, and Wm. B. Welles, trustees, to sell and dispose of the same and divide the proceeds among certain *cestui que trusts* named in said deed.

That on the 1st day of September, 1874, Wm. B. Welles
38 sold and conveyed all of section 33, township 89, range 28, to Woolsey Welles.

That on the 26th day of July, 1880, the plaintiff herein commenced an action in the circuit court of Webster county, Iowa, against Woolsey Welles, Alfred K. Welles, and William B. Welles, wherein he alleged the identical facts set out in the petition herein, and wherein he claimed the same relief as is claimed herein, as against these defendants; that Woolsey, A. K., and Wm. B. Welles appeared to said cause and on their petition the same was removed to the circuit court of the United States for the district of Iowa, where the same is now pending for trial and untried, either party may introduce in evidence the record in said cause to show the claim made and facts alleged.

That the defendant, J. P. Dolliver, was, on the plaintiff's application, appointed by the circuit court of Webster county, Iowa, on the 13th day of February, 1883, administrator of the estate of said Wm. B. Welles, deceased.

That at the time of his death the said Wm. B. Welles did not own any real or personal property in the State of Iowa, and had no interest, legal or equitable, in any property in said State unless the court holds as a matter of law on the facts of this case that he had some such interest in the lands described in the plaintiff's petition herein at the time of the commencement of this action, which the defendants do not admit, and that since his death no property or assets belonging to said estate has come into or been found within the State of Iowa.

That the value of the land described in plaintiff's petition as returned by the assessors of Webster county, Iowa, for the year 1863, and upon which valuation the taxes of 1863 were levied and assessed, was $26,757.

That the board of supervisors of said county, in the year 1863,

levied and assessed upon said lands and upon said valuation thereof for that year a tax of one mill upon the dollar of such valuation as and for a contingent tax, in addition to a five-mill ordinary
39 county tax; that said contingent tax was carried into the tax-list of said county for that year against said land and said tax, when collected, was used by said county in defraying and paying the ordinary county expenses of said county.

That the statutes of the State of New York now in force, and which have been in force since 1860, provide that "Any executor or administrator at any time, at least six months after the granting of the letters testamentary or of administration, may insert a notice once in each week for six months in a newspaper printed in the county, and in so many other newspapers as the surrogate may deem most likely to give notice to the creditors of the deceased, to exhibit the same with the vouchers thereof to such executor or administrator at the place of his residence or transaction of business, to be specified in such notice at or before the day therein named, which shall be at least six months from the day of the first publication of such notice."

That the statute of the State of New York now in force, and which has been in force since 1877, provides that "an executor or administrator, after the expiration of one year from the date of his appointment, may render his final account before the surrogate, and the same passed by the surrogate, and such executor or administrator discharged.

That the claim or demand upon which this action is brought has never been stated, sworn to, and filed by the plaintiff herein or his assignor, or by any other person for them or either of them, with the clerk of the circuit court of Webster county, Iowa, or with J. P. Dolliver, administrator, nor has a notice been served on said administrator, as provided by section 2408, code of 1873, nor has said claim ever been admitted by said Dolliver as such administrator, in writing or otherwise, with or without the approbation of the court.

That if judgment shall be rendered in favor of the defendants and against plaintiff the cost of the transcript of proceedings before the surrogate of Kings county, N. Y., in the matter of the settlement of the estate of Wm. B. Welles, deceased, shall be taxed as part of defendants' costs herein.

40 That the printed transcript of the record of the Supreme Court of the United States in the case of The Iowa Homestead Company *vs.* The Des Moines Navigation & Railroad Company and others may be received as evidence and considered by the court with like effect as the original might be, so far as material to any of the issues herein, either party having the right to offer in evidence such portions as he may deem relevant and material.

Signed this — day of September, 1883.

GEORGE CRANE,
Attorney for Plaintiff.

The defendants next offered in evidence the following conveyance from the Dubuque and Sioux City Railroad Company to Wm. J. Bar-

ney and others, trustees, duly recorded among the records of Webster county, in Deed Book E, page 482, in November, 1863:

Deed from Dubuque & Sioux City R. R. Co. to George J. Forrest et al., Trustees.

Book E, 428.

Know all men by these presents that The Dubuque & Sioux City Railroad Company, in consideration of one hundred and seven thousand dollars, received by them of George J. Forrest, Frederick C. Gebhard, and William J. Barney, trustees, have bargained and sold, and by these presents do bargain, sell, and convey, to the said George J. Forrest, Frederick C. Gebhard (both of the city of New York), and William J. Barney (of the city of Chicago, Illinois), trustees as aforesaid, their heirs, assigns, and other legal representatives, forever, the following-described lands, to wit:

Here follows a description of all the lands mentioned in plaintiff's petition.

Reserving to said railroad company the right of way across said lands, with full and free right to locate said railroad, to borrow earth, stone, or gravel for construction, and to deposit waste earth thereon when necessary; to have and to hold the said lands
41 to the said George J. Farrest, Frederick C. Gebhard, and William J. Barney, trustees, their heirs, assigns, and legal representatives, in fee simple, absolute, forever. The said railroad company will warrant and defend said premises to said grantees, their heirs, assigns, and other legal representatives, against the lawful claims of all persons whomsoever.

In testimony the president and secretary of said company sign their names this twelfth day of November, 1863, and the corporate seal is hereto affixed.

[Corporate Seal.]

(Signed) EDWARD STIMSON, *President.*
JAMES McKINLEY, *Secretary.*

[$200 stamp.]

Duly acknowledged before—

——— ———.

Also the following conveyance, recorded among the records of Webster county, on Deed Book E, page 572, in November, 1863:

Deed of Geo. J. Forrest et al., Trustees, to Iowa Homestead Co.

Whereas hereafter, to wit, on the 12th day of November, A. D. 1863, Frederick C. Gebhard and George J. Forrest, of the city of New York, and William J. Barney, of the city of Chicago, acting merely as trustees and employing therefor money furnished by them for that purpose, bought from the Dubuque and Sioux City Railroad Company certain lands hereinafter described for the use and benefit of Frederick Schuchardt, Frederick C. Gebhard, Charles L. Frost, George J. Forrest, William D. Thompson, Joseph Tuckerman, Lu-

cins Tuckerman, Morris K. Jesup, John B. Thompson, and Edward Stimpson; and whereas, afterwards, to wit, on the 29th day of April, A. D. 1864, said trustees bought with like funds and under similar circumstances certain other lands from T. B. Aldrich, also hereinafter described; and whereas since said purchase as above in their behalf said parties have incorporated themselves under the laws of the State of Iowa under the name and style of "The Iowa Homestead Company," and now desire to have the titles to said lands relinquished to said company; and whereas,
42 on 28th day of June, A. D. 1864, Frederick C. Gebhardt, one of said trustees, resigned his position and trust as trustee aforesaid and his resignation was duly accepted in writing by all the parties in interest: Now, therefore, in consideration of the premises and one dollar to each of us in hand paid, we, George J. Forrett and William J. Barney, remaining trustees, do hereby remise, release, and quitclaim unto the Iowa Homestead Company and its legal representatives forever all our right, title, and interest in and to the following-described lands situated in Webster county, State of Iowa, to wit:

Here follows a description of all the lands mentioned in the plaintiff's petition herein, with other lands.

Being in all 80,244 $\frac{24}{100}$ acres by Government survey, reserving to the Dubuque and Sioux City Railroad Company the right of way across, etc.

In testimony whereof we hereunto set our hands this twenty-fourth day of August, A. D. 1864.

GEORGE J. FORREST.
WM. J. BARNEY.

Duly acknowledged.

The plaintiff also offered in evidence the following conveyance from Wm. B. Welles to Wolsey Welles:

This indenture, made the first day of September, in the year one thousand eight hundred and seventy-four, between William B. Welles, of Kings county, in the State of New York, party of the first part, and Woolsey Welles, of Fort Dodge, Webster county, Iowa, of the second part, witnesseth: That the said party of the first part, in consideration of natural affection and the sum of five dollars, to him in hand duly paid before the delivery hereof, hath remised, released, and quitclaimed, and by these presents doth remise, release, and quitclaim, to the said party of the second part, his heirs and assigns, forever, all of section number thirty-three, in township number eighty-nine north, in range number twenty-eight west, of the fifth principle meridian, being in the town of Fort Dodge, in the county of Webster, in the State of Iowa, containing, according to the
43 United States Government survey, six hundred and forty acres of land, subject, however, to the terms and conditions of any contract in writing for the sale or lease of any part of said land heretofore made by Woolsey Welles, of Fort Dodge, Iowa, act-

ing as my agent or attorney, and subject also to the payment of all legal costs incurred or to be incurred in maintaining or defending my title to said land, with the appurtenance and all the estate, right, title, and interest of the said party of the first part therein; to have and to hold the above mentioned and described premises, with the appurtenances unto the said party of the second part, his heirs and assigns, forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

W. B. WELLES. [L. S.]

Duly acknowledged and recorded in December, 1875, in Book B of Deeds, page 257.

44 *Decree.*

This cause coming on for final hearing this 18th of December, A. D. 1883, and the court, having duly heard and considered the evidence of the parties and the arguments of counsel, finds the issues in favor of the plaintiff, It is, therefore, ordered, adjudged, and decreed that the plaintiff, Edward K. Goodnow, have and recover of and from J. P. Dolliver, as administrator of the estate of Wm. B. Welles, deceased, the sum of $5,405.58-100, five thousand four hundred and five 58-100 dollars, costs of suit taxed at —— dollars; that this decree, as to the defendants herein, be, and is hereby, made a special lien on the following-described real estate (here the clerk will insert the description of land as given in the petition) from the 20th day of January, 1864.

It is further ordered and decreed that the land above de-
45 scribed, or so much thereof as may be necessary, be sold under a special execution to be issued for that purpose and in accordance with the provision of law governing such sales, and that the proceeds of such sale be applied to payment of this decree or allowance, the costs of this suit, and the expenses of administration.

And that upon the completion of said sale and the delivery of the deed or deeds to the purchasers thereof the said J. P. Dolliver, Woolsey Welles, Alfred K. Welles, Wm. B. Welles, and George W. Welles, defendant in this suit, and all persons claiming by, through, or under them or either of them since the commencement of this suit, and each and every of them, shall be forever barred and foreclosed of all right and equity of redemption in and to the said land sold as aforesaid and any part thereof, and shall be forever enjoined and restrained from setting up or asserting any claim or right to said land or any part thereof *of* either in their individual right or as the representative of others. It is further ordered and decreed that the petition of plaintiff be dismissed as to George W. Welles, executor of Wm. B. Welles, deceased, and that he recover of plaintiff his costs, taxed at —— dollars; to all of which defendants, at the rendition of said decree, duly excepted.

D. D. MIRACLE,
Judge 11th Circuit, Iowa.

And afterwards, and on the — day of May, 1884, the court duly certified the foregoing evidence, and the defendants gave due notice and perfected their appeal to the supreme court of Iowa from the decision of said circuit court by serving notice of said appeal upon plaintiff's attorney and the clerk of said circuit court.

Assignment of Errors.

1. The court erred in rendering judgment against Geo. W. Welles, executor.

2. The court erred in rendering judgment against J. P. Dolliver, administrator.

3. The court erred in holding that the decedent, Wm. B.
46 Welles, had any assets, legal or equitable, in the State of Iowa to which administrator would attach.

4. The court erred in allowing plaintiff interest from January 20, 1864.

5. The court erred in allowing any interest prior to the commencement of the action.

6. The court erred in holding that the lands described in plaintiff's petition were taxable for the years 1860 and 1861 and allowing a recovery for the taxes of those years paid by plaintiff's assignor.

7. The court erred in making the judgment rendered a lien upon said lands.

8. The court erred in not holding that the decree rendered in the homestead case was a bar to plaintiff's right of recovery.

9. The court erred in not holding that plaintiff was barred by the statute of limitations.

THEO. HAWLEY,
Defendants' Attorney.

47 *Opinion of the Supreme Court of Iowa.*

GOODNOW *v.* WELLS *et al.*

Appeal from Webster circuit court.

MONDAY, *December* 14, 1885.

Action in chancery to recover for certain taxes paid by plaintiff's assignor upon lands the title whereof was in the defendants or their grantors, and to enforce a lien upon the lands for the amount of the taxes paid. The relief prayed for by the plaintiff was granted by the decree of the circuit court, from which defendants appeal.

Theodore Hawley for appellants.

George Crane for appellee.

BECK, *Ch. J.:*

I. This action involves no facts or questions of law which have not before been presented to and determined by this court in the numerous cases brought to recover taxes paid upon lands by claimants thereto under the grant by Congress to the Dubuque & Sioux City Railroad Company. These actions, as well as

this, were prosecuted against the claimants under what is called the "Des Moines River Grant," and a subsequent joint resolution of Congress of March 2, 1861, which, by the decision of the United States Supreme Court, were held to pass the title to the lands as against the railroad grant. By reference to the following cases the legislation and other facts involved in the questions arising in regard to the right of the claimants under the railroad grant to recover for taxes paid by them against the holders of the title under the Des Moines river grant may be fully discovered: Iowa Homestead Co. *v.* Webster Co., 21 Iowa, 221; Dubuque & P. R. Co. *v.*
48 Webster Co., *Id.*, 235; Stryker *v.* Polk Co., 22 *Id.*, 131; Litchfield *v.* Hamilton Co., 40 *Id.*, 66; Goodnow *v.* Litchfield, 59 *Id.*, 226; Goodnow *v.* Stryker, 61 *Id.*, 261; Same *v.* Same, 62 *Id.*, 221; Goodnow *v.* Litchfield, 63 *Id.*, 225; Goodnow *v.* Moulton, 51 *Id.*, 555; Litchfield *v.* County of Webster, 101 U. S., 774; Wolcott *v.* Des Moines Co., 5 Wall., 681; Homestead Co. *v.* Valley Railroad, 17 *Id.*, 153.

II. It is insisted by counsel for defendant that the action is barred by the statute of limitations of the State of New York; that a decision in a prior action operates as an adjudication of the rights of the parties in this case, and that the circuit court erred in allowing interest upon the sum paid by plaintiff from the date of payment; but these precise points have been decided by this court upon the same state of facts adversely to the position of defendant's counsel. See Goodnow *v.* Stryker, 62 Iowa, 221; Goodnow *v.* Litchfield, 63 *Id.*, 226.

III. Objections are made to the decree upon the ground that a lien is enforced against certain specified land and upon the lands owned by certain defendants. These objections are not argued. Attention is called to them briefly by what would probably be considered sufficient as an assignment of errors. But it cannot be claimed that there is an attempt to argue the objections. Under a familiar rule we are not permitted to consider objections that are not argued.

IV. One of the defendants, J. P. Doliver, is an administrator, and his intestate held title to the land, and, if alive, would have been liable to plaintiff on account of the taxes paid by him. The
49 decree runs against the administrator and is made a lien on the lands upon which the taxes in question were levied. Counsel for defendant now object to the decree "because the claim upon which this action is brought had never been stated, sworn to, and filed, and a copy served on the administrator, nor had the same been approved by the administrator." This objection was first made in this court, and was urged in no form in the circuit court. The administrator appeared and answered in the case, urging many defenses, but nothing of this kind. If there is anything in it the objection comes too late. The circuit court has jurisdiction of the parties and the subject-matter of the action, and could have entertained proceedings for the allowance of the claim, as is done in probate cases. It also has jurisdiction of the case in law or chancery if it may be prosecuted in either form. Now, if the case should have been prosecuted by probate proceedings the defendant, having

appeared and presented defenses in this action, cannot now defeat it on the ground that the claim should have been proved in the manner prescribed for probate cases. It is simply the case of the prosecution of an action by wrong proceedings. In addition to this, it may be said that the relief sought in this action is the enforcement of a lien which could not have been obtained in probate proceedings. The action was, therefore, rightly brought in chancery. Baldwin *v.* Tuttle, 23 Iowa, 66; McCrary *v.* Deming, 38 *Id.*, 527; McName *v.* Malvin, 56 *Id.*, 362.

V. It is insisted that the evidence fails to show an assignment of the claim to plaintiff, and that he is not, therefore, the real party in interest; but the abstract before us shows that the due assignment of the claim to plaintiff is admitted.

50 VI. The plaintiff's grantor claimed title to these lands under a grant of Congress made in 1856 to the Dubuque & Pacific Railroad Company; defendant acquired title thereto under a grant by Congress made in 1846 and confirmed and extended by a joint resolution of Congress of March 2, 1861. This resolution confirmed the grant as to all lands above the Raccoon Forks which were held by *bona fide* purchasers under the State. The State conveyed the land to defendant's grantors in 1858. Now, it is plain that, upon the passage and approval of the joint resolution, the title of the land passed from the Federal Government to the grantee of the State. The State had conveyed the land, though at the time it held no title; but the joint resolution, if it did not directly vest the title in the State's grantee, did vest it in the State, and that title inured to the benefit of the grantee, who thereby became clothed with the title. See Wolcott *v.* Des Moines Co., 5 Wall., 681, 687. The lands in question are above the Raccoon Forks and are covered by the legislation and conveyance referred to above. The act of Congress of July 12, 1862, extending the grant of 1846 to all alternate sections of old numbers within five miles of the Des Moines river, above the Raccoon Forks, does not apply to or affect the lands in controversy, for they had already been confirmed to the State and its grantees by the joint resolution of March 2, 1861. We discover that the title fully vested in defendant's grantors March 2, 1861. Under the laws of the State then in force (Revision, sec. 710) all property was taxable, except such as was exempt by revision, sec. 711, which provides (page 7) that Government lands entered or located or

51 lands purchased from the State shall not be taxed for the year in which the entry, location, or purchase is made. The terms "enter" and "locate," when applied to the acquisition of lands from the Government, have a fixed and certain meaning, and cannot be applied to the grants of land by a congressional act. Lands are "entered" when purchased at the Government Land Office and "located" when "scrip" or other instruments calling for specified quantities of land are used in the purchase of the lands, which are then said to be "located" under these instruments.

It is a familiar rule that congressional grants of lands of the character of the one under which defendants claim operate *in præsenti* and pass the title without conveyances or other assurance. It

sometimes is necessary to select or otherwise designate the lands which are conveyed by the grant, but that was not necessary in the case of the grant in question. It cannot be said that the lands of defendants were "entered" or "located." They were, in fact, conveyed by a congressional grant. It is clear that the provision above quoted excepting lands from taxation does not apply to these lands as having been "entered" or "located." The lands were not purchased from the State in 1861, but in 1858, and the legislation and patent of the State conveyed the State's interest in the land, and the interest afterwards acquired by the State inured to the purchaser, and his title, by relation, ran back to the grant by the State. See Wolcott *v.* Des Moines Co., *supra*. The lands, then, cannot be exempt from taxation as having been purchased from the State in 1861. We reach the very satisfactory conclusion that the lands were subject to taxation for the year 1861. We have there-
52 fore held that lands acquired under the Des Moines river grant were taxable for the year 1861. See Stryker *v.* Polk Co., 22 Iowa, 131; Litchfield *v.* County of Hamilton, 40 *Id.*, 66; Goodnow *v.* Stryker, 62 *Id.*, 221.

VII. Counsel for defendant, in support of the position that, under section 711 of the revision, the lands in question were exempt from taxation for the year 1861, cites Litchfield *v.* County of Webster, 101 U. S., 703, which construes that section and holds that under it lands are not taxable "until the next year after a patent could be demanded for them." This decision is based upon a mistaken view of the purport and effect of the decisions of this court in McGregor & M. R. R. Co. *v.* Brown, 39 Iowa, 655; Iowa Falls & S. C. R. Co. *v.* Cherokee Co., 37 *Id.*, 483; Goodnow *v.* Beaman, *Id.*, 563; Iowa Falls & S. C. R. Co. *v.* Woodbury Co., 38 *Id.*, 498. These decisions hold that lands acquired through a congressional grant to the State and by a grant of the State become taxable when the conditions of the grants are performed—or, in other words, when the lands have been "earned" by the grantee by the performance of the conditions of the grant, and that the patent for the lands issued by the Governor of the State is evidence that the lands were at the time of the issuance thereof so "earned." These cases do not hold that lands are not taxable until patents are issued therefor. When patents are spoken of in these decisions conveyances from the State by the Governor are meant. As a matter of fact, the United States has never patented lands to the State under the Des Moines river grants. Therefore the word "patent," when used by this court and the United States Supreme Court in connection with these lands, must be understood to refer to conveyances made by the State.

The doctrine of this court is that lands held under the con-
53 gressional and State grants, as are the lands involved in this action, are taxable when earned under the conditions of the grant, of which patents issued by the Governor of the State are evidence. As we have seen, the lands in question were conveyed by the State in 1858 to defendant's grantor. They were therefore taxable for subsequent years. Doubtless the Supreme Court of the United States was misled by the last sentence in the opinion of this

court in McGregor, etc., R. Co. *v.* Brown, *supra*, which, it must be admitted, is not an accurate expression of the effect of the statute and our prior decisions, if the word "patented" is to be understood as referring to a conveyance by the United States. The sentence is in these words: "Government lands are not taxable until a year after they are patented;" citing Rev., 1860, sec. 711. The statute cited declares that lands are not taxable until the next year after they are "entered" or "located" or "purchased from" the State. Lands "entered" and "located" may be and often are taxed before patents are issued, which are sometimes delayed for many months. It is plain that the word "patented" is used in the quotation just presented with reference to conveyance by the State, and not to patents by the United States. The decision of the United States Supreme Court interpreting the statute of this State in question is clearly incorrect and in conflict with prior decisions of this court. We cannot, of course, be expected to follow it and overrule our prior decisions. It is a rule nowhere disputed that the decisions of the supreme court of a State interpreting a statute of such a State must be followed by the Federal courts.

The foregoing discussion disposes of all questions in the case. The judgment of the circuit court must be affirmed.

54 *Judgment of the Supreme Court of Iowa. December* 14, 1885.

"EDWARD K. GOODNOW

vs.

GEO. W. WELLES *et al.*, App'l'ts.

Appeal from Webster circuit court.

In this cause, the court being fully advised in the premises, fi[illegible]er, their written opinion affirming the judgment of the circuit court, It is therefore considered by the court that the judgment of[illegible]s in court below be, and it is hereby, affirmed, and that a writ of an[illegible] *cedendo* issue accordingly.

It is further considered by the court that the appellants pay the costs of this appeal, taxed at $18.75, and that execution issue therefor."

I, G. B. Pray, clerk of the supreme court of Iowa, do hereby certify that the foregoing is a full, true, and complete copy of the final judgment entry of said court in the above-entitled cause, as full, true, and complete as the same remains on file and of record in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court this 13th day of Sept., A. D. 1887.

[Seal of the Supreme Court of Iowa.]

G. B. PRAY, *Clerk.*

Transcript fee, —.

55 *Supplemental Decree or Certificate.*

EDWARD K. GOODNOW, Appellee,

vs.

GEORGE W. WELLES, Executor, etc., WOOLSEY WELLES, A. K. WELLES, and WILLIAM B. WELLES, Jr., Appellants.

And now, on the application of said defendants, it is certified by the court here, and ordered to be made part of the record herein, that by the answer of the defendants and in defendants' assignment of errors and on the hearing in said cause the defendant claimed immunity from the entire demand and claim of plaintiff on the ground that, as they claimed, the same demand and claim had been adjudicated against plaintiff's assignor, the Dubuque and Sioux City R. R. Company, by the Supreme Court of the United States, at the October term thereof, A. D. 1872, in the case of the Iowa Homestead Company *vs.* The Des Moines Navigation & Railroad Company and others, including William B. Welles, Sr., who subsequently to said adjudication, conveyed the lands on which the taxes in question were paid to the defendants, Woolsey Welles, A. W. Welles, and William B. Welles, Jr., and who still subsequently died, leaving a will whereby he constituted the defendant, George W. Welles, his executor, and that our decision herein was and is against the immunity so claimed by said defendants.

And it is further certified and ordered to be made part of the record herein that the defendant, George W. Welles, by his answer and on the hearing of said cause claimed immunity from the entire claim and demand, because, as was claimed and alleged, the alleged cause of action not having accrued within six years preceding
56 the commencement of this action was barred by the statute of limitations of the State of New York, and that, to determine whether or not the decision of the Supreme Court of the United States in the case of Samuel G. Wolcott *vs.* the Des Moines Navigation & Railroad Company, reported in 5 Howard, 681, was a final determination of the question of title therein decided in order to determine when the plaintiff's cause of action accrued, and that our decision herein was and is that said decision was not a final determination of said question, and was and is against the immunity so claimed because of said decision that said determination was not final.

And it is further certified and ordered to be made part of the record herein that $3,096.55 of the amount herein found and adjudged to be due the plaintiff was so found and adjudged as and for that amount paid by plaintiff's assignor as and for taxes for the year 1861 on the lands in the petition described; that said lands are part of the so-called "Des Moines river lands," granted by the United States to the State of Iowa by act of Congress of August 8, 1846, entitled "An act granting certain lands to the Territory of Iowa to aid in the improvement of the navigation of the Des Moines river, in said Territory," the joint resolution of Congress of March